MESSRS TAI CHOI YU & CO, ADVOCATES v. ARIFIN ZAKARIA & ANOR

COURT OF APPEAL, KUCHING
UMI KALTHUM ABDUL MAJID JCA
AB KARIM AB JALIL JCA
STEPHEN CHUNG JCA
[CIVIL APPEAL NO: Q-01(NCVC)(A)-40-01-2017]
11 JUNE 2019

ADMINISTRATIVE LAW: *Judicial review – Proceedings – Application for leave to issue order of certiorari to quash decision refusing to proceed with disciplinary proceedings under paras. 12 and 13 of Judges' Code of Ethics 2009 – Appeal against refusal of leave – Whether Attorney General had standing to appear and attend at leave stage of judicial review proceeding – Whether Attorney General had separate and independent power and duty under Federal Constitution to defend and protect institution of Judiciary – Whether there was legal or factual impediment to Attorney General to appear and attend judicial review application – Rules of Court 2012, O. 53 – Federal Constitution, art. 145(4) – Courts of Judicature Act 1964, s. 14(1)*

The appellant was the plaintiff in an earlier High Court suit between the appellant and one Ting Sie Chung. The defendant in that suit filed an application under O. 18 r. 19 of the Rules of Court 2012 to strike out the writ and statement of claim which was dismissed by the High Court. The defendant's appeal to the Court of Appeal was, however, allowed and the suit was struck out. The appellant sent four letters and reminders to the judges sitting on the panel of the Court of Appeal, which comprised YA Zaharah Ibrahim ('YA Zaharah'), YA Tengku Maimun Tuan Mat ('YA Tengku Maimun') and YA Mohd Zawawi Salleh ('YA Mohd Zawawi') for the written grounds of judgment. Subsequently, the appellant sent a letter to the first respondent making a complaint for disciplinary proceedings against YA Zaharah and YA Tengku Maimun under paras. 12 and 13 of the Judges' Code of Ethics 2009 ('Judges' Code') for their refusal to 'promptly' write and supply the grounds of judgment and for their failure to act 'diligently and effectively', as provided under para. 7(7) of the Judges' Code. The appellant was informed by the second respondent that after investigations, there was no basis for complaint. The appellant filed an *ex parte* application for leave for judicial review for, *inter alia* (i) leave to issue an order of *certiorari* that the decision of the second respondent refusing to proceed with the disciplinary proceedings in accordance with the law against YA Zaharah and YA Tengku Maimun under the Judges' Code of the Federal Constitution for breaches of the said Code be quashed; (ii) leave for or an order for *mandamus* ordering the first respondent to determine the nature of the aforesaid breaches

under paras. 12 and 13 of the Judges' Code and thereafter under paras. 14, 15 and 16 thereof; and (iii) for a declaration that the aforesaid second respondent's decision was a nullity, null and void and *ultra vires* the Judges' Code under the Federal Constitution. After hearing the appellant and a Senior Federal Counsel ('SFC') from the Attorney General's Chambers at the application, the High Court Judge refused leave for the judicial review. Thus, the appellant appealed against the said decision. The issue that arose was whether the Attorney General and/or his officers had the standing to appear and attend at the leave stage of a judicial review proceeding notwithstanding that he was not representing the putative respondents.

Held (dismissing appeal)
Per Stephen Chung JCA delivering the judgment of the court:

(1) Under art. 145(2) of the Federal Constitution, it shall be the duty of the Attorney General to perform such other duties of a legal character and to discharge the functions conferred on him by or under the Federal Constitution or any written law. Article 145(4) provides that in the performance of his duties, the Attorney General shall have the right of audience in, and shall take precedence over any other person appearing before, any court or tribunal in the Federation. The Attorney General is a public officer under the Federal Constitution and art. 145 properly read gives ample power to the Attorney General to represent the Government and any body or person performing any function under the Federal Constitution. Notwithstanding the provisions of s. 24 of the Government Proceedings Act 1956 and that the Attorney General was not representing the Government nor any party, the Attorney General has a separate and independent power and duty under the Federal Constitution to step in and defend and protect the institution of the Judiciary and in the interest of the administration of justice in the country where the Judiciary is under attack. (paras 16 & 19)

(2) In a judicial review application under O. 53 of the Rules of Court 2012, the application must be served on the Attorney General. This rule is based on the principle that judicial review is a principal tool of 'public law' applicable to 'public bodies'. As public bodies impliedly attract public interest and the guardian of public interest is the Attorney General, this makes the Attorney General a nominal party in all judicial review applications. The intention of the rule is to ensure that the Attorney General vets all judicial review applications in order to ascertain if his participation is warranted. Whether the Attorney General elects to appear or not is solely his discretion and if he elects to appear, the court is bound to give a hearing. The Attorney General's role in the public interest is to safeguard public authorities or public

institutions by deterring or eliminating clearly ill founded claims without the need for them to become a party to litigations and to prevent public administrative actions from being paralysed. (para 20)

(3) In the judicial review application filed by the appellant, the first and second respondents, although not sued as such, were acting in their official capacity and performing their duty as the Chief Justice of the Federal Court and the President of the Court of Appeal respectively when the appellant made the complaint. There was no legal or factual impediment to the Attorney General or his officers to appear and attend the judicial review application to defend and protect the institution of the Judiciary and in the interest of the administration of justice. (para 21)

(4) There is no definition of 'diligently', 'efficiently' or 'promptly' nor does the Judges' Code provide or set out any time frame for a judge to write his judgment. Of course it should be within a reasonable time or as soon as possible depending on the facts and circumstances of each case including the length of the trial or hearing, the number of witnesses, whether voluminous documents or voluminous notes of proceedings, the complexity of the case and the submissions made. Based on court records, a panel of three judges of the Court of Appeal, including the two judges complained of, heard and allowed the defendant's appeal in that suit and gave their broad grounds on the day of hearing the appeal and subsequently gave their written grounds when required by the Federal Court after the appellant filed leave to appeal. The appellant did not complain nor sue the other judge who was on the same panel. This was illogical. (paras 24 & 25)

(5) Reading the Judges' Code, the Chief Justice has a wide discretion to decide, after consulting the President of the Court of Appeal in this case, whether there was merit in the complaint or whether the judge was in breach of the Code and whether to refer the judge to a tribunal appointed under cl. (4) of art. 125 of the Constitution, or may refer the matter to the Judges' Ethics Committee, established under the Judges' Ethics Committee Act 2010. Therefore, there was nothing in the Code or the Constitution to make it mandatory or to compel the respondents to refer the two judges to the Committee or the tribunal for disciplinary actions to be taken. Section 14(1) of the Courts of Judicature Act 1964 provides that no judge or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of the jurisdiction. (paras 26 & 27)

(6) In a judicial review leave application, the applicant musts satisfy the threshold for leave to be granted. In exercising its power to grant leave, the High Court must sieve through the application to see whether it was frivolous, vexatious and had any merit for further arguments on the substantive motion. The appellant had previously sued the Court of Appeal and the two judges complained of. The suit was dismissed and the appeals were also dismissed. The appellant did not submit that there was conflict of interest nor that there was a real danger of bias. There was no basis for the appellant to sue or join the respondents in this judicial review application. The SCF on behalf of the Attorney General had the right to appear and to be heard during the judicial review application and the trial judge had not erred in not granting leave for the judicial review application. (paras 28 & 29)

Case(s) referred to:

Five Heritage Sdn Bhd & Ors v. Peguam Malaysia & Ors [2018] 1 LNS 1158 CA ***(refd)***

Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor [2008] 1 CLJ 651 CA ***(refd)***

Kanawagi Seperumaniam v. Dato' Abdul Hamid Mohamad [2004] 5 MLJ 495 ***(refd)***

Messrs Tai Choi Yu & Co, Advocates v. The Court of Appeal of Malaysia & Ors [2017] 7 CLJ 329 CA ***(refd)***

Peguam Negara Malaysia v. Nurul Izzah Anwar & Ors [2017] 5 CLJ 595 CA ***(refd)***

Tun Dato' Hj Mohamed Salleh Abas v. Tan Sri Dato' Abdul Hamid Omar & Ors [1988] 2 CLJ 739; [1988] 1 CLJ (Rep) 294 SC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 14(1)
Federal Constitution, arts. 125(3), (3B), (4), 145(2), (4)
Government Proceedings Act 1956, s. 24(1)(a), (2)
Rules of the Court 2012, O. 18 r. 19, O. 53
Specific Relief Act 1950, s. 44(1)(b)

For the appellant - Tai Choi Yu; M/s Tai Choi Yu & Co Advocs
For the respondent - Shamsul Bolhassan; SFC

[Editor's note: For the High Court judgment, please see Tai Choi Yu & Co Advocates v. Arifin Zakaria & Anor [2017] 1 LNS 1325 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Stephen Chung JCA:

The Appeal: Background Facts

[1] The appellant was the plaintiff in an earlier High Court Suit No. MYY-22NCvC-15-7-2013 between the appellant and one Ting Sie Chung @ Ting Sieh Chung. The defendant in that suit filed an application under O. 18 r. 19 to strike out the writ and statement of claim which was dismissed by

the High Court at Miri. The defendant appealed to the Court of Appeal in Civil Appeal No. Q-02(IM)-188-01-2014. On 14 August 2014, the Court of Appeal allowed the appeal and struck out the suit. The panel of judges sitting in the Court of Appeal comprised of YA Zaharah bte Ibrahim, YA Tengku Maimun binti Tuan Mat and YA Dato' Haji Mohd Zawawi bin Salleh.

[2] The appellant sent four letters and reminders to the three judges for the written grounds of judgment. On 15 March 2016, the appellant sent a letter to the first respondent making a complaint for disciplinary proceedings against YA Zaharah bte Ibrahim and YA Tengku Maimun bte Tuan Mat under paras. 12 and 13 of the Judges' Code of Ethics 2009 for their refusal to "promptly" write and supply the grounds of judgment and for their failure to act "diligently and efficiently" as provided under para. 7(7) of the Judges' Code of Ethics 2009. By the letter dated 5 April 2016, the appellant was informed by the second respondent that after he (the second respondent) had investigated the complaint, there was no basis for the complaint.

[3] The appellant filed an *ex parte* application for leave for judicial review *inter alia*: (i) for leave to issue an order of *certiorari* that the decision of the second respondent dated 5 April 2016 refusing to proceed with the disciplinary proceedings in accordance with the law against YA Zaharah binti Ibrahim and YA Tengku Maimun binti Tuan Mat under the Judges' Code of Ethics 2009 of the Federal Constitution for breaches of the said Code be quashed as provided under paras. 12 and 13 therein; (ii) for leave for or an order for *mandamus* ordering the first respondent to determine the nature of aforesaid breaches under paras. 12 and 13 of the said Code and thereafter under paras. 14, 15 and 16 thereof; (iii) for a declaration that the aforesaid second respondent's decision made on 5 April 2016 is a nullity, null and void and/or void *ab initio* and/or unlawful and/or illegal and/or *ultra vires* the Judges' Code of Ethics 2009 under the Federal Constitution.

[4] After hearing the appellant and a Senior Federal Counsel (SFC) from the Attorney-General Chambers at the *ex parte* application, the learned High Court Judge refused leave for the judicial review. This is the appeal by the appellant against that decision.

The Appellant's Submission

[5] The appellant submitted that the learned High Court Judge had erred and misdirected himself in his refusal to grant leave for the judicial review on an *ex parte* application for leave and had failed to exercise his discretion judicially and judiciously and had taken irrelevant matters into consideration.

[6] The appellant submitted that the learned judge had erred to allow the SFC to appear for the hearing of the appellant's *ex parte* application for leave when he was not invited to attend and to allow the SFC to file written submission when the SFC was not acting for the putative respondents and without a certificate of public interest issued by the Attorney General to so attend.

[7] It was submitted that the learned judge had erred to allow the SFC to barge into the chambers and to take over the management of the *ex parte* application without a certificate of public interest issued by the Attorney General under s. 24(2) of the Government Proceedings Act 1956.

[8] The learned judge had erred to allow the SFC to appear when the SFC had admitted that he was not acting as *amicus curiae* and not acting for the two putative respondents who were not represented by counsel. It was submitted that therefore the SFC had no *locus standi* to appear in the *ex parte* application.

The Attorney General's Submission

[9] It was submitted that the appearance of the Attorney General at the leave stage in a judicial review was pursuant to O. 53 of the Rules of Court 2012 which makes it compulsory to give notice of any proceedings related to judicial review to alert the Attorney General to take appropriate action as deemed necessary. Failure to serve would result in the application being dismissed.

[10] Upon being served, it made the Attorney General the party representing the public interest and has a right to appear. It was submitted that when the Attorney General appeared, the court had to recognise his presence and to hear what the Attorney General had to say. It was submitted that as guardian of public interest at this stage, it would necessarily include the right to appeal against an order granting leave.

[11] It was submitted that therefore the court had no jurisdiction not to hear the Attorney General who appeared and objected to the leave application. It was submitted that the leave application was rightly dismissed because it did not merit argument on a substantive stage.

[12] It was submitted that the Judges' Code of Ethics does not impose a legal duty on the respondents to act in the manner dictated by the appellant. In the absence of any legal duty which is imperative in nature imposed upon the respondents under paras. 12 and 13 of the Code, the appellant failed to satisfy the condition under s. 44(1)(b) of the Specific Relief Act 1950.

[13] It was further submitted that the judicial immunity under s. 14 of the Courts of Judicature Act 1964 applied here and there were no merits in the appellant's application against the respondents for the judicial review. A

The Court's Decision

[14] Reading the written submissions and hearing the oral submissions of the appellant and SFC in this appeal, the appellant's complaint was against the Attorney General or SFC in appearing and attending the *ex parte* hearing for leave for the judicial review application. The appellant submitted that the putative respondents were not represented by counsel nor by the Attorney General and that the Government or Attorney General was not a party in this action. It was submitted that the SFC who appeared had admitted that he was not acting for the putative respondents nor as *amicus curiae*. It was submitted that the Attorney General or SFC was not invited to attend at the hearing and therefore had no *locus standi* and that the learned judge had erred. B C

[15] We had read the grounds of judgment of the learned judge. We had taken note that the Attorney General was not acting for the putative respondents nor as *amicus curiae* in these proceedings. The SFC however submitted that the Attorney General has wide powers to represent the Government and public interest under the Federal Constitution and has the right to appear. The appellant countered that the Government was not sued and not a party and the Attorney General or his officers had no right to appear under s. 24(1)(a) of the Government Proceedings Act 1956. The appellant also contended that if this was a public interest case as the SFC had submitted, the Attorney General did not certify in writing that it was in the public interest and failed to comply with s. 24(2) of the same Act. On the facts and circumstances of this case, we were of the view that s. 24 was not applicable and the Attorney General could not and did not rely on s. 24 to appear. D E F

[16] The question was, did the Attorney General and or his officers have the standing to appear and attend at the leave stage of a judicial review proceedings notwithstanding that he was not representing the putative respondents. There are ample authorities to say that they have. We refer to art. 145 of the Federal Constitution. Under art. 145(2), it shall be the duty of the Attorney General to perform such other duties of a legal character and to discharge the functions conferred on him by or under the Federal Constitution or any written law. Article 145(4) provides that in the performance of his duties, the Attorney General shall have the right of audience in, and shall take precedence over any other person appearing before, any court or tribunal in the Federation. It has been held that the Attorney General is a public officer under the Federal Constitution and that art. 145 properly read gives ample power to the Attorney General to G H I

represent the Government and any body or person performing any function under the Federal Constitution: *Tun Dato Hj Mohamed Salleh Abas v. Tan Sri Dato' Abdul Hamid Omar & Ors* [1988] 2 CLJ 739; [1988] 1 CLJ (Rep) 294; [1988] 3 MLJ 149.

[17] In *Indah Desa Saujana Corp Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor* [2008] 1 CLJ 651; [2008] 2 MLJ 11, the first defendant was sued as a judge in his capacity in performing his duties as a High Court Judge. There was an application to prevent the Attorney General or his officers from acting for the judge which was dismissed. The Court of Appeal in dismissing the appeal held that in the absence of particulars to substantiate them, there were no legal or factual impediment for the Attorney General and his officers providing legal representation to the first defendant and that the Attorney General was under a mandatory duty to provide the first defendant with legal representation **in order to defend and protect the office and institution of the administration of justice in the country** (emphasis added).

[18] In *Messrs Tai Choi Yu & Co, Advocates v. The Court of Appeal of Malaysia & Ors* [2017] 7 CLJ 329; [2017] 6 MLJ 254, the Court of Appeal in that case echoed a similar sentiment that the Attorney General being an officer established under the Federal Constitution must step in defence of judges sued in the course of performing their duties in the protection of the institution of the Judiciary and in the interest of administration of justice.

[19] On the above authorities, notwithstanding the provisions of s. 24 of the Government Proceedings Act and that the Attorney General was not representing the Government nor any party, the Attorney General has a separate and independent power and duty under the Federal Constitution to step in to defend and protect the institution of the judiciary and in the interest of the administration of justice in the country where the Judiciary is under attack. Traditionally, and by convention, the Judiciary does not speak out against any complaints on the Judiciary and unable to defend itself except by the Attorney General and the power to punish any contempt of itself which is sparingly used.

[20] Further, in a judicial review application, under O. 53 of the Rules of Court 2012, the application must be served on the Attorney General. This rule is based on the principle that judicial review is a principal tool of 'public law' applicable to 'public' bodies. As public bodies impliedly attract public interest and the guardian of public interest is the Attorney General, this makes the Attorney General a nominal party in all judicial review applications. The intention of the rule is to ensure that the Attorney General vets all judicial review applications in order to ascertain if his participation is warranted. Whether the Attorney General elects to appear or not is solely

his discretion and if he elects to appear, the court is bound to give a hearing: *Kanawagi Seperumaniam v. Dato' Abdul Hamid bin Mohamad* [2004] 5 MLJ 495. It has also been held that the Attorney General's role in the public interest is to safeguard public authorities or public institutions by deterring or eliminating clearly ill-founded claims without the need for them to become a party to litigations and to prevent public administrative actions from being paralysed: *Peguam Negara Malaysia v. Nurul Izzah Anwar & Ors* [2017] 5 CLJ 595; [2017] 4 MLJ 656.

[21] In the judicial review filed by the appellant, the first and second respondents, although not sued as such, they were acting in their official capacity and performing their duty as the Chief Justice of the Federal Court and the President of the Court of Appeal respectively when the appellant made the complaint. On the facts and circumstances, there was no legal or factual impediment to the Attorney General or his officers to appear and attend the judicial review application to defend and protect the institution of the Judiciary and in the interest of the administration of justice.

[22] The appellant's complaint was for disciplinary proceedings to be taken against YA Zaharah bte Ibrahim and YA Tengku Maimun bte Tuan Mat under paras. 12 and 13 of the Judges' Code of Ethics 2009 for their refusal to "promptly" write and supply the grounds of judgment and for their failure to act "diligently and efficiently" as provided under para. 7(7) of the Judges' Code of Ethics 2009. The Judges' Code of Ethics is prescribed in cl. (3B) of art. 125 of the Federal Constitution, which also provide the procedure to be followed and sanctions which can be imposed other than the removal of a judge from office under cl. (3), in relation to a breach of any provision of the Code of Ethics. This Code is intended to state the basic standards and to provide guidance to judges in maintaining their personal and judicial conduct.

[23] Under para. 12 of the Judges' Code of Ethics, any complaint against a judge who is alleged to have committed a breach of any provision of this Code shall be in writing to the Chief Justice of the Federal Court. Under para. 13(1), where a complaint is received under para. 12 and the Chief Justice is of the opinion that the complaint has no merit, he may dismiss it after consulting the President of the Court of Appeal if the judge complained of is a judge of the Court of Appeal. Any such complaint must be *bona fide*, on substantial grounds, not frivolous nor intended to bring the Judiciary into contempt.

[24] The appellant's complaint was that the two judges did not promptly write and supply the grounds of judgment and failed to act diligently and efficiently in breach of para. 7(7) of the Judges' Code of Ethics. Paragraph 7(7) reads as follows:

> A judge shall endeavour to diligently and efficiently hear and complete the cases in his court and promptly write his judgments.

There is no definition of "diligently", "efficiently" or "promptly" nor does the Judges' Code of Ethics provide or set out any time frame for a judge to write his judgment. Of course it should be within a reasonable time or as soon as possible depending on the facts and circumstances of each case including the length of the trial or hearing, the number of witnesses, whether voluminous documents or voluminous notes of proceedings, the complexity of the case and the submissions made.

[25] Based on court records, a panel of three judges of the Court of Appeal, including the two judges complained of, heard and allowed the defendant's appeal in that suit and gave their broad grounds on the day of hearing the appeal and subsequently gave their written grounds when required by the Federal Court after the appellant filed leave to appeal. We took note that the appellant did not complain nor sued the other judge who was on the same panel. This was illogical. After receiving the complaint, the first putative respondent was of the opinion that there was no merit in the complaint after consulting the second putative respondent who then informed the appellant of this decision.

[26] Reading the Judges' Code of Ethics, the Chief Justice has wide discretion to decide, after consulting the President of the Court of Appeal in this case, whether there is merit in the complaint or whether the judge is in breach of the Code and whether to refer the judge to a tribunal appointed under cl. (4) of art. 125 of the Constitution or may refer the matter to the Judges' Ethics Committee established under the Judges' Ethics Committee Act 2010. Therefore, there is nothing in the Code or the Constitution to make it mandatory or to compel the respondents to refer the two judges to the Committee or the tribunal for disciplinary actions to be taken.

[27] We were referred to s. 14(1) of the Courts of Judicature Act which provides that no judge or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of the jurisdiction. This confers judicial immunity to judges in the discharge of their judicial duties which extends to the respondents in this case: see *Indah Desa Saujana Corp Sdn Bhd*'s case (*supra*).

[28] In a judicial review leave application, the applicant must satisfy the threshold for leave to be granted. In exercising its power to grant leave, the High Court must sieve through the application to see whether it is frivolous, vexatious and has any merit for further arguments on the substantive motion: see *Five Heritage Sdn Bhd & Ors v. Peguam Malaysia & Ors* [2018] 1 LNS 1158; [2019] 1 MLJ 317. The appellant had previously sued the Court of Appeal and the two judges complained of. The suit was dismissed and the appeals were also dismissed: see *Messrs Tai Choi Yu & Co, Advocates (suing as a firm and Tai Choi Yu as sole proprietor) v. The Court of Appeal of Malaysia & Ors* (*supra*). The appellant did not submit that there was conflict of interest nor that there was a real danger of bias. There was no basis for the appellant to sue or join the respondents in this judicial review application.

[29] For the reasons given, the SFC on behalf of the Attorney General had the right to appear and to be heard during the judicial review leave application and the learned judge had not erred in not granting leave for the judicial review application. We therefore unanimously dismissed the appeal with costs of RM1,000, and ordered the deposit, if any, to be refunded.